No. 80-25

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY W. BARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by the initial stop of his van, by his warrantless arrest, or by the ensuing warrantless search of the van.

2. Whether the evidence was sufficient to sustain petitioner's conviction for receipt and possession of contraband cigarettes.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1980. A petition for rehearing was denied on June 5, 1980 (Pet. App. 3a). The petition for a writ of certiorari was filed on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of receipt and possession of contraband cigarettes, in violation of 18 U.S.C. (Supp. III) 2342(a), and on one count of carrying a pistol without a license, in violation of D.C. Code Ann. § 22-3204 (1973). He was sentenced to imprisonment for one year and one day on the contraband cigarette count and to a concurrent six-month term on the firearm count. The court of appeals affirmed (Pet. App. 2a).

1. On petitioner's pretrial motion to suppress the cigarettes and pistol, the following facts were stipulated (J.A. 21-34).[1] In 1978, the metropolitan police began an investigation of the G.W. Cochran Company, a wholesale cigarette dealer located in the District of Columbia, because the company was known to have evaded payment of District of Columbia cigarette taxes by selling cigarettes to wholesalers and retailers from other jurisdictions without collecting the required tax. On September 8, 1978, a local detective observed petitioner receive a load of cigarettes from the Cochran warehouse

[1] "J.A." refers to the joint appendix in the court of appeals.

in the District of Columbia and transport them in a van to Virginia. The detective subsequently learned that petitioner had a record of arrests and convictions for untaxed-cigarette offenses.[2]

On October 2, 1978, the detective again observed petitioner receive and transport cigarettes from the Cochran warehouse to Virginia, where the cigarettes were transferred to a van bearing Pennsylvania license plates. The latter vehicle was followed into Pennsylvania, where the driver was arrested for violation of the Pennsylvania cigarette tax laws. The cigarettes bore Virginia, but not District of Columbia, tax stamps.

On November 7, 8, and 30, 1978, and on February 23, March 30, and April 3, 1979, the detective observed petitioner receive large quantities of cigarettes from Cochran, and, following the November and February pickups, he observed petitioner transport the cigarettes into Virginia. The detective subsequently learned that petitioner did not have a Virginia tobacco merchant license, nor was he registered with the District of Columbia as a Virginia tobacco merchant so as to exempt him from payment of District of Columbia sales tax on the cigarettes he purchased from Cochran.

On April 5, 1979, the detective and other local and federal officers observed Cochran employees load approximately 181 half-cases of cigarettes (1,086,000 cigarettes) into petitioner's van. After the loading was completed, petitioner and a companion entered the van and drove away.

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[2]Petitioner was arrested for transporting cigarettes from North Carolina into Virginia without paying Virginia sales tax on August 15, 1978. On March 6, 1974, petitioner was convicted in New Jersey for possessing untaxed cigarettes, and he was convicted for the same offense in New York on September 24, 1975.

The officers, traveling in four cars including a marked scout car, surrounded petitioner's vehicle and pulled it to the curb. By the time the officers got out of their cars, petitioner and his passenger had exited the van, leaving the doors open. When the detective asked to see his driver's license, petitioner volunteered that he was a businessman on his way to Virginia with a load of cigarettes. In response to the detective's question where was he taking them, petitioner said that he was taking them to his warehouse and that he would "sell to anyone who would buy them." Petitioner then re-entered the van, reached into a gym bag that was between the bucket seats, and produced an expired Virginia sales tax certificate, a District of Columbia sales and use tax Certificate of Registration (which does not apply to the purchase of cigarettes), an expired 1978 Virginia retail tobacco license, and an application for a 1979 Virginia license that had not been filed, all of which he handed to the detective. When the detective repeated his request for a driver's license, petitioner again returned to the van and reached into the gym bag, which permitted another officer to observe a gun in the bag.

At that point, petitioner was placed under arrest and advised of his *Miranda* rights. The officers then searched the van and found the 181 half-cases of cigarettes. A check of one pack of the cigarettes in the van showed that there was no District of Columbia tax stamp affixed thereto.

2. At trial, the foregoing evidence concerning the stop of petitioner's vehicle and seizure from him of the pistol and cigarettes was admitted. In addition, the government presented a District of Columbia tax official, who testified (Tr. 275-276) that District of Columbia law imposes a tax on all cigarettes sold in the District, except that the

District's tax regulations permit wholesalers to sell cigarettes bearing the tax stamps of another jurisdiction to retailers who hold retailer's licenses in the other jurisdiction and who intend to sell the cigarettes there.

At the conclusion of the government's case, petitioner moved for a judgment of acquittal on the ground, *inter alia,* that the government had not proved that he did not have a valid Virginia cigarette retail sales license at the time of his arrest in April 1979, which motion was denied (Tr. 289-290). Thereafter, a Virginia county license clerk, who was called as a defense witness, testified (Tr. 294) that petitioner's Virginia tobacco retail license expired on December 31, 1978, and that it had not been renewed.

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the officers' stop and ensuing search of his van violated his Fourth Amendment rights. The trial judge and the court of appeals properly rejected this contention.

This Court has established that police officers may briefly stop a vehicle or detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity. *United States* v. *Mendenhall,* No. 78-1821 (May 27, 1980) (opinion of Powell, J.); *Brown* v. *Texas,* 443 U.S. 47, 51 (1979); *Delaware* v. *Prouse,* 440 U.S. 648, 655-657 (1979); *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 881 (1975); *Adams* v. *Williams,* 407 U.S. 143, 145-146 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 30 (1968). As the Court explained in *Adams* v. *Williams, supra,* 407 U.S. at 146,

> [a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Here, as petitioner himself concedes (Pet. 17-18), an abundance of facts justified a reasonable suspicion, if not probable cause to believe, that petitioner and his companion were transporting contraband cigarettes. As the result of extended surveillance and investigation, the officers knew that on eight occasions during the preceding seven months petitioner had obtained large quantities of cigarettes from Cochran—a business known to have evaded payment of District of Columbia cigarette taxes by selling cigarettes to out-of-town wholesalers and retailers—and had transported them to Virginia. They knew that petitioner had a record of convictions for offenses involving untaxed cigarettes and that the District of Columbia sales tax had not been paid on the cigarettes he purchased and transferred to a Pennsylvania contact the preceding October. They also knew that petitioner did not have a Virginia tobacco merchant's license and was not registered as a Virginia tobacco merchant so as to exempt him from payment of the District of Columbia tax. Finally, shortly before the stop, they observed petitioner obtain a large quantity of cigarettes from Cochran and begin his customary route toward Virginia. In these circumstances, which strongly suggested that on this occasion as well petitioner was transporting cigarettes on which the District of Columbia tax had not been paid, the police were amply justified in stopping the van to verify the identities of its occupants and to make inquiries concerning the nature of the merchandise contained therein. Indeed, on the facts outlined above, we believe that probable cause existed at the time petitioner's vehicle was stopped.[3]

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[3]Petitioner's claim (Pet. 11-12) that *Terry* v. *Ohio, supra,* extends only to stops for the purpose of "patting-down" a suspect for weapons is without merit, in light of the Court's subsequent application of the *Terry* rationale to cases in which there was neither any indication of a suspicion that the suspect was armed nor any mention of a "pat-down" having been conducted in connection with

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the stop. See, *e.g., United States* v. *Mendenhall, supra; United States* v. *Brignoni-Ponce, supra.* In *United States* v. *Vasquez,* 612 F. 2d 1338 (2d Cir. 1979), the majority of the court expressly rejected the identical contention, which was suggested (612 F. 2d at 1351 n.5) by the dissent, holding (612 F. 2d at 1345) that the strong implication of *Terry* and its progeny is that "entitlement to make the *stop* depends on a reasonable belief that the suspect is engaging in criminal activity, regardless of whether he is also armed and dangerous."

Dunaway v. *New York,* 442 U.S. 200 (1979), does not support petitioner's claim. In that case, the Court simply held (442 U.S. at 212-213) that the rationale of *Terry* v. *Ohio* could not justify an extended police station detention for the purpose of interrogation that was tantamount to an arrest. Indeed, the Court recognized (*ibid.*) that under *Terry* v. *Ohio* and its progeny, a brief investigative stop is permissible. Here, in contrast to the situation that obtained in *Dunaway,* petitioner was detained only briefly before his voluntary actions precipitated his arrest. He was not removed from the scene of the stop for questioning, and the only thing the police requested before petitioner began volunteering information was to see his driver's license.

Petitioner's further suggestion (Pet. 15) that *Miranda* warnings should have preceded the detective's questioning of him is similarly without foundation. "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon* v. *Mathiason,* 429 U.S. 492, 495 (1977); see *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966). They are not required to be given in preliminary investigative questioning under the circumstances presented here. See, *e.g., United States* v. *Collom,* 614 F. 2d 624, 628 (9th Cir. 1979); *United States* v. *Harris,* 611 F. 2d 170, 173 (6th Cir. 1979). Indeed, in *Allen* v. *United States,* 390 F. 2d 476, 479 (D.C. Cir. 1968), the court of appeals held that suppression of a confession that followed, *inter alia,* a request for a driver's permit and automobile registration was not required, and opined to the contrary in *Allen* v. *United States,* 404 F. 2d 1335, 1336 (D.C. Cir. 1968), relied on by petitioner, only after it was revealed that the challenged confession had not been made until ten minutes after the defendant had been placed under arrest. Here, when the detective asked petitioner about the destination of the cigarettes, petitioner was not in custody; he had been stopped only momentarily for the apparent purpose of examining his driver's license. The remaining

As the district court found (Pet. App. 6a), the additional events that occurred after the initial stop provided probable cause for both petitioner's arrest and the ensuing warrantless search of the van. See, *e.g.*, *United States* v. *Hall*, 557 F. 2d 1114, 1117 (5th Cir.), cert. denied, 434 U.S. 907 (1977). Thus, instead of showing the detective his driver's license, as requested, petitioner volunteered that he was on his way to Virginia with a load of cigarettes and displayed invalid or worthless documents in an apparent attempt to convince the officers that he was exempt from District of Columbia cigarette sales tax. These unsolicited actions confirmed the suspicion that petitioner was transporting untaxed cigarettes. The impression that criminal activity was afoot was enhanced by the presence of a handgun in petitioner's gym bag.[4]

The warrantless search of the van that followed petitioner's arrest was also proper. It is well settled that, because of the mobile character of a motor vehicle, as well as an occupant's diminished expectation of privacy in its contents, the police may conduct a warrantless search of a vehicle when there is probable cause to believe it contains evidence or instrumentalities of a crime. See *Colorado* v. *Bannister*, No. 79-1901 (Oct. 20, 1980); *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132

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statements made by petitioner were volunteered, and not the result of questioning. See generally *Rhode Island* v. *Innis*, No. 78-1076 (May 12, 1980).

[4]The presence of the handgun concealed in the gym bag itself may have provided a sufficient ground for arrest. At the time petitioner was stopped the District of Columbia Code (D.C. Code Ann. § 22-3204 (1973)) prohibited the possession of a pistol without a license. Cf. *United States* v. *Bills*, 555 F. 2d 1250, 1251 (5th Cir. 1977); *United States* v. *Story*, 463 F. 2d 326, 328 (8th Cir.), cert. denied, 409 U.S. 988 (1972).

(1925). Here, the van had been stopped on a public highway, its occupants arrested for possession of contraband cigarettes, and the police had probable cause to believe that the cigarettes were in the van. Under these circumstances, the search of the van was entirely proper.

2. Petitioner also contends (Pet. 20-23) that an element of the offense of possession of contraband cigarettes is that he was not licensed as a cigarette retailer in Virginia at the time of his arrest, and that the government failed to prove that element.

The short answer to petitioner's contention is that "when a statute sets forth a proviso which is not descriptive of the crime, but which operates to exempt conduct otherwise [prohibited], the burden is upon the accused to bring himself within its protection." *United States* v. *Moore,* 613 F. 2d 1029, 1044 & n.127 (D.C. Cir. 1979), cert. denied, No. 79-6031 (May 19, 1980); *United States* v. *Chodor,* 479 F. 2d 661, 663 (1st Cir.), cert. denied, 414 U.S. 912 (1973); *United States* v. *Ramzy,* 446 F. 2d 1184, 1186 (5th Cir.), cert. denied, 404 U.S. 992 (1971); *7 Fifths Old Grand-Dad Whiskey* v. *United States,* 158 F. 2d 34, 36 (10th Cir. 1946), cert. denied, 330 U.S. 828 (1947). Compare *United States* v. *Vuitch,* 402 U.S. 62, 70-71 (1971) (where enacting clause of abortion statute contained broad exceptions to its prohibitions, the government was required to prove that the exceptions were inapplicable). Here, the statute proscribing the trafficking in contraband cigarettes incorporates by reference the tax stamp scheme of the jurisdiction where the cigarettes are found.[5] Neither the federal statute nor

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[5]18 U.S.C. (Supp. III) 2342(a) makes it unlawful "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. (Supp. III) 2341(2) defines "contraband cigarettes" as "a quantity in excess of 60,000 cigarettes which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such

the District of Columbia cigarette tax statute, however, makes the exception upon which petitioner relies a part of the description of the prohibited conduct.[6] Rather, the exception to the tax stamp requirement for out-of-state licensees is contained in implementing regulations of the District of Columbia Council that describe the seller's duties with respect to the collection of the tax.[7] Accordingly, petitioner, and not the government, bore the

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State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes * * *."

[6]D.C. Code Ann. § 47-2802 (1973 & Supp. IV 1977) provides in pertinent part:

> (a) There shall be levied, collected, and paid on all cigarettes sold in the District by licensed wholesalers, licensed retailers, or by licensed vending-machine operators, to consumers, a tax at the rate of 13 cents on each twenty cigarettes or fractional part thereof, such tax to be levied, collected, and paid once only on cigarettes sold as aforesaid.
>
> * * * * *
>
> (c) Said tax shall be collected and paid by the affixture of a stamp or stamps secured from the Collector of Taxes, denoting the payment of the amount of the tax imposed by this chapter upon such cigarettes, each such affixture to be on the original package, unless the District of Columbia Council shall by regulation permit otherwise. Cancellation of such stamps shall be in the manner prescribed by regulation approved by the Council.

[7]Title 16, Section 9.4(f)(1) of the District of Columbia Regulations on Cigarette Taxes provides, in pertinent part, as follows:

> A wholesale licensee is authorized to sell to persons not licensed under the Act, cigarettes not bearing evidence of a payment of the tax imposed by the Act if —
>
> * * * * *
>
> (ii) The purchaser, at the time of the sale, is licensed by another jurisdiction to engage in the business of selling cigarettes in that jurisdiction * * *.

burden of proving that he came within the exception afforded out-of-state licensees.[8]

Moreover, even if petitioner's construction of the elements of the offense were correct, the testimony of a defense witness that at the time of his arrest petitioner did not have a current Virginia license provided evidence of the fact that he did not fall within the exception for out-of-state licensees. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164 & n.1 (1954); *United States* v. *White*, 611 F. 2d 531, 536 (5th Cir. 1980). Thus, in any event, petitioner is entitled to no relief.

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[8]Petitioner's reliance (Pet. 22) on *Colt* v. *United States*, 158 F. 2d 641 (5th Cir. 1946), is misplaced. The defendant in *Colt* was indicted for falsely representing himself to be a citizen of the United States, but the government failed to establish that the defendant was not, in fact, a naturalized citizen. The Court reversed the conviction, holding (158 F. 2d at 641) "[t]hat the defendant was not [at the time he made the representations] a citizen by naturalization or otherwise is of the essence of the offense." Similarly, in *United States* v. *Walters*, 73 F. Supp. 72 (D.D.C. 1947), case certified to the Supreme Court, 175 F. 2d 340 (D.C. Cir.), appeal dismissed, 335 U.S. 869 (1948), in which the district court granted a motion for acquittal on the charge of carrying a pistol without a license on the ground that the indictment had failed to allege that the defendant did not have a license, it stated (73 F. Supp. at 73) that "[w]here a statute defining an offense contains an exception which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately described if the exception is omitted, the indictment must allege facts showing that the accused is not within the exception." In *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court held that a state could not impose on a defendant the burden of proving the absence of the heat of passion on sudden provocation in order to reduce a homicide from murder to manslaughter, characterizing (421 U.S. at 696) "the presence or absence of the heat of passion on sudden provocation [as having] been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." Here, by contrast, failure to fall with an exception accorded by local regulation is not an essential part of the offense prohibited by 18 U.S.C. (Supp. III) 2342(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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